(2)

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

No. 01-893

In The

Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA,

Respondent.

On Petition For Writ Of Certiorari To
The Court of Appeals, State of California

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

DAVID SMITH
BUILDING INDUSTRY LEGAL
DEFENSE FOUNDATION
1330 SOUTH VALLEY VISTA DRIVE
DIAMOND BAR, CALIFORNIA 91765
(909) 396-9993

THOMAS JON WARD
COUNSEL OF RECORD
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

Attorneys for Amici Curiae

19pp

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 4

I. ALL FEES AND EXACTIONS MUST BE REVIEWED IN THE CONTEXT OF *NOLLAN* AND *DOLAN* 4

II. BUILDERS ARE NOT THE CAUSE OF CALIFORNIA'S AFFORDABLE HOUSING PROBLEM 6

A. Housing Affordability Is Influenced By Many Factors Outside The Control Of Builders 6

B. The City of Napa's Municipal Financing Scheme Combined with Artificial Growth Boundaries Led to Increased Housing Prices 8

C. The City's Ordinance Simply Adds Another Cost to Building a Home 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4

Armstrong v. United States, 364 U.S. 40 (1960) 6

Dolan v. City of Tigard, 512 U.S. 374 (1994) 5

Ehrlich v. City of Culver City,
911 P.2d 429 (Cal. 1996) 5

Home Builders Association of Northern California v. City of Napa, 90 Cal.App.4th 188 (2001) 4

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) 4

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 5

OTHER

Candida Ruesga, *The Great Wall of Phoenix?: Urban Growth Boundaries and Arizona's Affordable Housing Market*, 32 Ariz. St. L. J. 1063 (2000) 9

California Budget Project, *Locked Out: California's Affordable Housing Crisis* (2000) 7-8

California Department of Housing and Community Development, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* 9

Donna Kimura, *State Addresses Housing Crisis With Cautious Optimism*, Affordable Housing Finance, October 2001 7

Home Builder Press, *Producing Affordable Housing: Partnerships for Profit* (1999) 6

Housing Element Steering Committee, *City of Napa's Growth Management Strategy, December 12, 2000 Report To The City Council* 12

Jennifer Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 359 (1995) 9

John J. Delaney, *What Does It Take To Make a Take?* 27 Urb. Law. 55 (1995) 4

Kevin Courtney, *Caps On High-end Development Not Included In City Housing Plan*, Napa Valley Register, December 6, 2000 (visited Jan. 14, 2002) <http://www.napanews.com> 12

Martin Leitner & Susan Schoettle, *A Survey of State Impact Fee Enabling Legislation, in* Exactions, Impact Fees and Dedications (Robert Freilich and David Bushek ed., 1995).....9

National Association of Home Builders, *Decent Affordable Housing, It's the American Dream* (2001).....9

Samuel Staley and Gerard Mildner, Reason Public Policy Institute, *Urban-Growth Boundaries and Housing Affordability: Lessons from Portland* (1999).....11

Susanna Kniffen, *Housing Takes Center Stage*, California Real Estate, October 2000.....7

Wendell Cox and Ronald Utt, *Smart Growth, Housing Costs and Homeownership*, 1426 The Heritage Foundation Backgrounder (2000) 10

INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense Foundation ("BILD") have received the parties' written consent to file this brief as amici curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States, including more than 5,700 members in the state of California. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes, particularly when such remedies are in any way obstructed by a state court.

Since its inception, NAHB has played an integral role in increasing affordable housing for low-income people. Many of its members, both nationally and in California, construct multifamily buildings, including government-subsidized housing. Therefore, as NAHB works to ensure an affordable housing market exists for buyers, it works to ensure an affordable rental market exists for those who lease their homes.

---

[1] Pursuant to Rule 37.6 of this Court, amici state that their counsel authored this brief and amici paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amici made a monetary contribution to its preparation.

NAHB has been before the Court as amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Reservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, --- U.S. --- (oral argument held January 7, 2002).

BILD is a non-profit corporation, organized and existing under the laws of the state of California. Established in 1987, BILD is dedicated to eliminating barriers to the American dream of home ownership. As an organization wholly owned by the Building Industry Association of Southern California, Inc. ("BIA/SC"), BILD represents and advocates on behalf of more than 1750 BIA/SC member companies in eight chapters in Southern California, including landowners, developers, home builders, and building industry subcontractors of all kinds.

SUMMARY OF ARGUMENT

The California Court of Appeals and other state courts have used the most rudimentary analysis when reviewing fee ordinances, such as the City of Napa's, and have ignored this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The lower court's simplistic analysis ignores the reality of why a segment of society can afford decent shelter.

Housing affordability is a nationwide problem. There are numerous reasons why a segment of our society cannot afford decent shelter. There are factors that influence the amount of money a purchaser or renter can spend on housing; and there are factors that influence the price of satisfactory housing. In California, the lack of affordable housing is due to job growth, a decline in the number of homes built and the techniques local governments have used to finance public resources. In the City of Napa, the problem was further complicated when the government developed an urban growth boundary thereby capping the amount of developable land. By conducting a simplistic analysis, the court below ignored the realities of Napa housing problem.

REASONS FOR GRANTING THE WRIT

I. ALL FEES AND EXACTIONS MUST BE REVIEWED IN THE CONTEXT OF *NOLLAN* AND *DOLAN*.

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court ruled that a compensable taking occurs when a regulation either (1) fails to substantially advance a legitimate state interest, or (2) deprives an owner economically viable use of his property. *See also* John J. Delaney, *What Does It Take To Make a Take?* 27 Urb. Law. 55 (1995) (The *Agins* standard for a taking is a disjunctive test.) In the case below, the California Court of Appeals, under the first prong of *Agins*, determined that the City of Napa's ordinance did not affect a Fifth Amendment taking. Using the first prong of *Agins*, it simplistically reasoned that providing affordable housing is a legitimate state interest, and that by requiring builders to supply that housing (by building it or paying for it), the ordinance substantially advanced that legitimate interest. *Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4th 188, 195-96 (2001).

The lower court's reasoning, however, could be used to shield any statute or ordinance from takings scrutiny. The analysis in *Home Builders* effectively precludes the rigorous scrutiny this Court requires to determine if land use regulations pass Fifth Amendment muster. As this Court recognized in *Lucas*, "a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Lucas v. South*

Carolina Coastal Commission, 505 U.S. 1003, 1025 (1992).

As the Petitioner's brief provides, state courts are split on whether to review a challenge to legislatively enacted fees in the context of this court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[2] Petitioner's Petition for Writ of Certiorari at 13-19. Read together, these precedents require first an essential nexus between the governmental interest at issue and the actual governmental demand made on the property owner, and second that the governmental demand be "roughly proportional" to the actual impact generated by the development project. *Nollan*, 483 U.S. at 837, *Dolan*, 512 U.S. at 391.

The Court should grant certiorari here to ensure that *Agins* prong 1 can not be satisfied by mere, rote recitation of legislation findings or broad policy objectives. Indeed, in the instant case, the Court should make clear that the City of Napa's ordinance--and all other land use regulations that impose exactions and/or fees as conditions to development--must be assessed under the "essential nexus" requirement of Nollan, and the "rough proportionality" requirement of Dolan. *Nollan*, 483 U.S. at 837, *Dolan*, 512 U.S. at 391.

In failing to apply the *Nollan/Dolan* tests, the court below ignored this Court's reminder that the Fifth Amendment "was designed to bar government from forcing some

---

[2] Even the California Supreme Court, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), held that when a development permit exacts a fee as a condition it is appropriate to apply the *Nollan/Dolan* analysis.

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Furthermore, by not scrutinizing the matter, the court below did not examine the reality behind the affordable housing problem in California or the City of Napa.

II. BUILDERS ARE NOT THE CAUSE OF CALIFORNIA'S AFFORDABLE HOUSING PROBLEM.

A. Housing Affordability Is Influenced By Many Factors Outside The Control Of Builders.

There are numerous factors that affect both the price of housing and the amount homebuyers[3] can spend on decent shelter. Material, land and labor costs, as well as substantial administrative fees all affect housing prices. The amount of money homebuyers can afford is influenced by their incomes and the amount of money they must spend on necessaries, such as food and health care. Housing affordability is therefore a two-sided equation. To get more citizens into decent shelter there must be both a reduction in builders' costs and an increase in the homebuyer's purchasing power. Home Builder Press, *Producing Affordable Housing: Partnerships for Profit* (1999).

---

[3] "Homebuyers" refers to both purchasers and renters.

In California, three factors specifically contribute to the housing problem:

the amount of new housing built has declined,
job growth has exceeded housing, and
California's system of local government finance has driven up the cost of homes.

See California Budget Project, *Locked Out: California's Affordable Housing Crisis* 8, 37-41 (2000), *See also* Susanna Kniffen, *Housing Takes Center Stage*, California Real Estate, October 2000, at 16.

In the 1990s, developers in California built about half the number of new homes as compared to the previous two decades.[4] Factors that are responsible for this decline include the early 1990s recession and neighborhood opposition to multifamily housing. California Budget Project, *Locked Out*, supra, at 40. Furthermore, changes to state law made investments in rental housing less desirable, which discouraged production of less profitable affordable housing. *Id.*

In addition, housing production failed to keep up with job growth.[5] In fact, in 1999, only ten California counties built sufficient housing to keep pace with the demand projected for 2003. *Id.* at 38. Because of this job growth, the state's population grew by 611,000 in 2000. Donna Kimura, *State Addresses Housing Crisis With Cautious Optimism*,

---

[4] "Between 1990 and 1999, building permits were issued for an average of 110,581 units of housing each year. In contrast, permits were issued for an average of 215,585 units per year during the 1970s and 203,369 units per year during the 1980s." California Budget Project, *Locked Out: California's Affordable Housing Crisis* 8 (2000).

[5] "California's population increased by 4.4 percent, while the supply of housing rose by just 1.6 percent." California Budget Project, *Locked Out*, supra, at 32.

Affordable Housing Finance, October 2001 at 48. Basic economics offers that when demand grows and supply does not, prices will increase.

The final factor that has led to California's affordable housing problem is its system of local finance. The California Budget Project notes that

> Over the past two decades, local officials have turned to fees and exactions imposed on new development to finance the schools, roads, sewers, parks and other basic infrastructure typically needed by new housing developments. . . . The added cost of paying for facilities that were once shared across the entire community increases the cost of housing, pushing homeownership further out of reach of young families and others of modest means.

California Budget Project, *Locked Out*, supra, at 40.

Thus, a variety of factors has caused the California affordable housing problem, and it is therefore unfair to place the burden of repairing the problem with a small segment of society.

B. The City of Napa's Municipal Financing Scheme Combined with Artificial Growth Boundaries Led to Increased Housing Prices.

Nationwide, traditional zoning and land use regulations, and the use of "alternative financing techniques," such as the City's affordable housing ordinance, have driven

housing costs to unnecessarily high levels. *See* Jennifer Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 359 (1995), Martin Leitner & Susan Schoettle, *A Survey of State Impact Fee Enabling Legislation, in* Exactions, Impact Fees and Dedications 60 (Robert Freilich and David Bushek ed., 1995). An NAHB survey shows that in major metropolitan areas, "development costs and fees added an average of $21,000 to the cost of a $200,000 home in highly regulated markets." National Association of Home Builders, *Decent Affordable Housing, It's the American Dream* (2001).

The City of Napa is typical of a municipality that has used alternative financing techniques to increase revenue. According to the California Department of Housing and Community Development, development fees for a 25-unit subdivision in Napa add approximately $35,170 per unit. California Department of Housing and Community Development, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* 67, Table 8 (2001).

Moreover, similar to what occurred in Napa, municipalities around the country have enacted "urban growth boundaries" ("UGB") to control development. A UGB is an artificially designated line beyond which the government prohibits or deters development. They can either be enacted by the legislature or passed by ballot. Many commentators have recognized that these "[a]rtificial land use controls, which affect the availability of land for housing, increase housing costs in the long run." Candida Ruesga, *The Great Wall of Phoenix?: Urband Growth Boundaries and Arizona's Affordable Housing Market*, 32 Ariz. St. L. J. 1063, 1066 (2000); *See*

Wendell Cox and Ronald Utt, *Smart Growth, Housing Costs and Homeownership*, 1426 The Heritage Foundation Backgrounder 6 (2000) (Explaining that restricting the amount of land indirectly raises the prices of homes.)

The policies of Napa County combined with the policies of the City of Napa are a perfect example of artificial controls raising the cost of housing.

> Napa adopted a limit line in 1975 in an attempt to cap the city's population at 75,000. Residential development was still allowed in rural areas, providing a relief valve for the residential housing market. Then, in the early 1990s, the county clamped down on new development. Residential-building permits plummeted by 74.2 percent from 1989 to 1996 as a moratorium on residential permits took effect in the county and a regional-housing recession took hold in the 1990s. As the recession gave way to the current economic boom, building permits increased, but not as quickly as in other parts of the Bay Area without growth boundaries.
>
> An affordability wedge between rural and urban residents [also emerged] in Napa County. As the growth controls took hold, the average value of a single-family home in unincorporated areas of Napa County climbed 158.1 percent to over 373,000 from 1985 to 1997. The average value of a new single-family home in the City of Napa increased by less than half the rate in rural

> areas (66.8 percent), but the rate of increase doubled after the county growth controls created an effective regional-growth boundary.

Samuel Staley and Gerard Mildner, Reason Public Policy Institute, *Urban-Growth Boundaries and Housing Affordability: Lessons from Portland* 2-3 (1999).

Thus, the evidence shows it was the city's fees and growth controls combined with the policies of Napa County that raised home prices and created the affordable housing problem for the city. Government policies, not builders, raised home prices. Therefore, unless there is truly a "nexus" between impacts from development and the lack of affordable housing, and the government demands are "roughly proportional" to that impact, it is unreasonable for the City to exact more property or add more fees to new homes in the name of affordable housing.

C. The City's Ordinance Simply Adds Another Cost to Building a Home.

The impact of Napa's ordinance on homebuilders is severe. It requires builders to sell their product below fair market value, or pay a fee[6], even though it is the government's policies and regulations that force housing prices to rise above an affordable level. The examples

---

[6] The City of Napa's Ordinance is either a fee or an exaction, depending on the alternative that the builder chooses. If the builder sells 10% of his or her homes at less then fair market value, then the government has exacted those homes for a public purpose. The other alternative is to pay a fee that is based on the square footage of every home that the builder wishes to construct.

below demonstrate the financial impacts of the City of Napa Ordinance.

Assume that a developer wants to build a neighborhood with twenty 2500 square foot homes.

Pursuant to the ordinance at issue, for example, the developer has the option to sell 10% of his units at "affordable" prices. City of Napa Municipal Code § 15.94.050(A), Petitioner's Appendix G-29. Furthermore, under one alternative, one-half of those units must be "available at affordable sales prices to households whose annual income does not exceed 100% of median income," and the other half must be "available at affordable sales prices to moderate income households." City of Napa Municipal Code §§ 15.94.050 (H)(1) & (H)(3), Petitioner's Appendix G-25-36. Pursuant to the City of Napa's Growth Management Strategy, December 12, 2000 Report To The City Council By The Housing Element Steering Committee, Attachment A, the "affordable" sales price limit for a three-bedroom home for a median income family would be approximately $165,277[7] and the sales price limit for moderately priced three-bedroom home would be approximately $198,333.[8] These numbers can be compared to the price of an average three-bedroom house in Napa, which is $365,000. Kevin Courtney, *Caps On High-end Development Not Included In City Housing*

---

[7] This number was approximated as an average of the low and moderate sales prices.

[8] These prices are based on a monthly payment of 33% of gross income. Note that the Napa Ordinance is based on a monthly payment of 30% of gross income. Thus, the affordable sales prices provided herein are actually higher than would be allowed under the ordinance. City of Napa Municipal Code § 15.94.020(C), Petitioner's Appendix G-11.

Plan, Napa Valley Register, December 6, 2000 (visited Jan. 14, 2002) <http://www.napanews.com>.

A second way a builder can comply with the City of Napa's ordinance is by paying an "in lieu housing fee." Pursuant to City of Napa Municipal Code § 15.94.050 (E), Petitioner's Appendix G-32, the fee is a percentage of the "construction costs," as determined by resolution of the city council. Construction costs are "the estimated cost per foot of construction, as established by the building department of the City of Napa . . ." *Id.* Per the city's resolution, the fee is 1% if the "construction cost" is between $86,700 and $115,250 and 2% if the "construction cost" is over 115,250. City of Napa's Resolution R1999/161, Petitioner's Appendix H-4. Furthermore, pursuant to the City of Napa's fee schedule, valuation is based on $90.60 per square foot.

Using the example, the "construction cost" of each 2500 square foot home would be $226,500. This translates into an "in lieu fee" of $4530[9] per home, or $90,600 for the development.

Thus, the City of Napa's ordinance attempts to make home prices more affordable by exacting a builder's product or by adding another fee to the price of a home. The city's reasoning is hard to understand, since these additional fees further raise the actual cost of new housing.

---

[9] Note that this $4530 fee is only one of many fees that the builder must pay.

CONCLUSION

In cities around the country and especially in the City of Napa, government has failed to seriously address the problem of housing affordability. Specifically, the City of Napa has instituted fees and enacted growth controls that have increased the price of land and homes beyond which many people can afford. Subsequently, the city enacted an ordinance that requires a small subset of society, residential builders, to help repair a problem caused by the government. This "repair" takes the form of fees and exactions that will further increase the price of a home.

The *Agins* test does not allow a court to make a serious inquiry into whether an ordinance, similar to the one enacted by the City of Napa, is reasonable. Therefore, we suggest that the *Nollan/ Dolan* analysis is appropriate to provide proper constitutional scrutiny in this matter.

For these reasons, the National Association of Home Builders and the Building Industry Legal Defense Foundation urge this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the decision of the California Court of Appeals.

DATED: February 4, 2002

Respectfully submitted,

Thomas Jon Ward
National Association
of Home Builders